

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	SPB Case No. 97-2003
)	
RAYMOND M. NOVENCIDO)	
)	BOARD DECISION
From dismissal and non-punitive)	(Precedential)
termination from the position of)	
Correctional Administrator at High Desert)	
State Prison, Department of Corrections at)	NO. 98-10
Susanville)	December 8 – 10, 1998

APPEARANCES: William L. Williams, Jr., Attorney, on behalf of appellant, Raymond M. Novencido; Gregory L. Nicholas, Staff Counsel, Department of Corrections, on behalf of respondent, Department of Corrections.

BEFORE: Florence Bos, President; Richard Carpenter, Vice President; Lorrie Ward, Ron Alvarado and James Strock, Members

DECISION

The Department of Corrections (Department), in a single notice, both dismissed and non-punitively terminated appellant, Raymond M. Novencido based on his misdemeanor conviction for battery upon his stepdaughter, which resulted in his inability to possess a firearm and consequent failure to meet one of the conditions for continued employment as a Correctional Administrator. In this decision, the State Personnel Board (SPB or Board): (1) finds that the Department could simultaneously non-punitively terminate and dismiss appellant; (2) sustains the non-punitive termination, and modifies the dismissal to a six-month suspension; and (3) concludes that the non-punitive termination takes precedence over the suspension when determining appellant's future employment rights.

BACKGROUND

Factual Summary¹

On May 1, 1996, at 11:00 p.m., appellant became involved in an argument with his 16-year old stepdaughter regarding a \$500.00 telephone bill on the family phone. The stepdaughter had been having severe behavioral problems including skipping school, public intoxication, joy riding, and numerous disputes with school officials. During the argument with appellant, the stepdaughter was evasive, hostile, and insolent. When she started to mouth off, appellant spontaneously slapped her backhand, hitting her nose with a ring he was wearing. As a result, the stepdaughter's nose was broken and her eyes were blackened. Appellant's wife took the stepdaughter to the hospital for treatment. Appellant himself notified the police of the incident. Articles about the incident appeared in the local newspapers and identified appellant as a Department employee.

Appellant was subsequently charged with three serious felonies concerning the injuries to his stepdaughter. As a result of a plea bargain, appellant eventually pleaded guilty to a misdemeanor count of simple battery under Penal Code § 242. Appellant was subsequently sentenced to one day in the county jail, with credit for time served, six months of formal probation, completion of an anger control program, and payment of court costs and fees. At the time of sentencing, the judge stated that, in his opinion, appellant's conduct did not rise to the level of moral turpitude.

¹ The factual summary is taken, in substantial part, from the Proposed Decision.

As a result of the conviction for misdemeanor battery, appellant was prohibited from owning or possessing any firearm for a period of ten years after conviction under Penal Code § 12021, subdivision (c). The provisions of section 12021 that permit law enforcement officers convicted of certain offenses to petition the court to carry firearms while on duty are not applicable to convictions under Penal Code § 242. On January 12, 1998, appellant successfully completed probation, and the court set aside the conviction under the provisions of Penal Code § 1203.4. The dismissal of charges under section 1203.4, however, did not remove appellant's firearm disqualification under section 12021. As a result, appellant continues to be disqualified from carrying, using, or possessing a firearm for a period of ten years from the date of the original conviction under state law.²

The official specification for the class of Correctional Administrator, Department of Corrections, provides that employees in the classification are sworn peace officers who must be able to perform the following duties:

Be able to respond to any part of an institution to assume responsibility for observing and directing the response of staff to emergency situations and crises that could involve combative situations requiring the use of legal force. In such emergency situations, may be required to disarm, subdue, and apply restraints to an inmate; run to the scene of a disturbance or emergency; run up or down stairs; defend self against an inmate armed with a weapon; prevent escapes and injury by inmates or parolees to themselves, employees and to property, and fire weapons in combat/emergency situations. (Emphasis added.)

The job specification further provides the following special requirement:

Any person prohibited by State or Federal law from possessing, using, or having in his/her custody or control any firearm, firearm device, or other

² Appellant initially was prohibited from possessing or using a firearm under Federal law as well. [18 U.S.C. section 922(g)(9)] However, the dismissal of the charges under section 1203.4 apparently removed the federal disqualification.

weapon or device authorized for use by the California Department of Corrections is not eligible to compete for, be appointed to, or continue employment in this classification

At the hearing before the ALJ, appellant admitted that he struck his stepdaughter on May 1, 1996, as charged. He testified that his action was a spontaneous one caused by his frustration at the actions of an out-of-control teenager. He did not mean to injure her and was remorseful about his conduct. He conceded that his off duty behavior warranted some disciplinary action but believed that termination after a 25-year career with the Department of Corrections was too severe. Although he admitted that his conviction for misdemeanor battery under Penal Code § 242 disqualified him from carrying or using a firearm under state law, he contended that Correctional Administrators are rarely called upon to use firearms, except in the most extreme emergencies, and that managers at that level are not required to undergo annual firearm requalification, but are only required to annually review written firearms policies. Appellant suggested that the Department should have permitted him to demote to a non-peace officer position, such as Correctional Business Manager, rather than terminating him after 25 years with the Department. Appellant pointed out that the sentencing judge in his criminal case stated his belief that appellant's termination over this incident was an unjust result.

Procedural Summary

By a "Notice of Adverse Action and Notice of Non-Punitive Termination" (Notice) dated June 9, 1997, the Department informed appellant that he was dismissed under Government Code § 19590 effective July 5, 1997, and non-punitively terminated under Government Code § 19585. The Notice specified that the dismissal and non-punitive

termination were based on: (1) appellant's admitted one-time physical assault upon his stepdaughter; (2) his subsequent misdemeanor battery conviction; and (3) his inability to possess or use a firearm as a result of the battery conviction, which rendered him unable to meet one of the conditions for continued employment as a Correctional Administrator.

After a hearing, the Administrative Law Judge (ALJ) issued a Proposed Decision that sustained the non-punitive termination based on the Board's precedential decision in George Lannes (1992) SPB Dec. No. 92-10. The Proposed Decision also found that, in light of all the surrounding circumstances, the appropriate penalty for appellant's misconduct would be a six-month suspension, not a dismissal. The Proposed Decision concluded, however, that the non-punitive termination effected a permanent separation of appellant's employment that precluded the imposition of the suspension. The Proposed Decision determined that the proper disposition of the two actions was to revoke the dismissal and sustain the non-punitive termination.

The Board rejected the Proposed Decision to consider the issue of whether the Board is obligated to revoke appellant's dismissal if it sustains the non-punitive termination.

ISSUES

1. Could the Department simultaneously dismiss and non-punitively terminate appellant?
2. May the Board sustain both a non-punitive termination and an adverse action?
3. If so, what are appellant's future employment rights?

DISCUSSION

The Department could simultaneously dismiss and non-punitively terminate appellant.

Pursuant to Government Code § 19585, an appointing power may non-punitively terminate an employee who fails to meet a requirement for continuing employment.

Subdivision (a) of that section provides that a non-punitive termination under

Government Code § 19585

may be used in lieu of adverse action ... when the only cause for action against an employee is his or her failure to meet a requirement for continuing employment.... (Emphasis added.)

Appellant argues that the term “in lieu of” as used in this subdivision means that an appointing power cannot, at the same time, under any circumstances, initiate both an adverse action and a non-punitive termination against an employee. Appellant’s interpretation of this subdivision misreads the plain language of the statute. The term “in lieu of” as used in Government Code § 19585(a) is restricted by the condition “when the only cause of action against an employee is his or her failure to meet a requirement for continuing employment.” (Emphasis added.) In addition, Government Code § 19585(a) uses the term “may,” and not “shall.” Thus, Government Code § 19585(a) permits, but does not require, a department to initiate a non-punitive termination, instead of a dismissal, against an employee when the department chooses to rely solely upon the employee’s failure to maintain a requirement for continuing employment as cause for termination. Government Code § 19585(a) does not, however, restrict an appointing power from both dismissing and non-punitively terminating an employee when, as in this case, the dismissal is based on further factual allegations in addition to the assertion that the employee fails to meet a continuing employment requirement.

Appellant's dismissal was based on allegations that he had slapped his stepdaughter and been convicted of a misdemeanor, in addition to his inability to possess or use a firearm, a requirement of his job. There is no language in Government Code § 19585(a) that prevents the Department from initiating both a dismissal and a non-punitive termination against appellant in light of the facts alleged in this case.

The Attorney General opinion³ (Attorney General Opinion) cited in the Proposed Decision does not compel a different result. The Attorney General Opinion, among other things, found that if an employee submits a resignation before the effective date of a dismissal, the dismissal never can become effective. In reaching this conclusion, the Attorney General reasoned that a resignation under these circumstances would permanently sever the employee's employment relationship before the dismissal could take effect. In other words, an employee who has already resigned no longer holds a position within the civil service from which he or she can be dismissed.

In this case, the Department notified appellant that he was being dismissed at the same time it notified him that he was being non-punitively terminated. While the Notice stated that the dismissal would take effect at the close of business on July 5, 1997, but contained no effective date for the non-punitive termination, it appears clear from all the circumstances that the Department intended that both the dismissal and the non-punitive termination would take effect at the same time. Unlike the facts set forth in the Attorney General Opinion, since both actions in this matter were intended to occur at

³ 29 Ops. Cal. Atty. Gen. 115 (1957)

the same time, the non-punitive termination did not occur before the dismissal became effective. Thus, the non-punitive termination did not effect a prior permanent severance of appellant's employment that precluded the imposition of the dismissal.⁴

Appellant contends that the doctrine of election of remedies should be applied in this matter, and that, under that doctrine, the Department should have been required to make a binding election of either dismissal or non-punitive termination in the Notice. In his brief, appellant argues that the Department's imposition of both a non-punitive termination and a dismissal is "inherently inconsistent and plainly unjust" to appellant.

The election of remedies doctrine applies only in those limited cases where a party takes inherently inconsistent positions; it is not applicable in cases where a party may legally pursue different remedies alternatively or cumulatively, and there are no facts that show that pursuit of these different remedies would cause substantial injury or prejudice to the opposing party.⁵ As set forth below, the doctrine of election of remedies does not apply under the circumstances presented by this case.

First, the Department did not take inconsistent positions by seeking both to dismiss appellant based on his assault upon his stepdaughter, his battery conviction and his inability to possess or use a firearm and to non-punitively terminate him based solely on his inability to possess or use a firearm. These two actions were based on a

⁴ See, 3 Ops. Cal. Atty. Gen. 365, 371 (1944) (An employee who resigns after a dismissal has become effective but before the Board has decided the employee's appeal therefrom does not cause the dismissal to become moot.) See also Kennick v. Commission on Judicial Performance (1990) 50 Cal. 3d 297, 307; People v. Becker (1952) 180 Cal. App. 2d 764.

⁵ Kirkpatrick v. WestAmerica Bank (1998) 65 Cal. App. 4th 982, 990. See 3 Witkin on California Procedure (4th ed. 1996) § 188, p. 259.

consistent set of facts; the Department has not made any claims in support of one action that would negate any of the claims it has made in support of the other.

Second, as set forth above, applicable law does not prohibit the Department from effecting both a non-punitive termination and a dismissal in a single notice in light of the facts asserted in this case. There are no provisions within the civil service statutes or the Board's regulations that provide that a non-punitive termination and a dismissal are mutually exclusive actions that cannot be asserted together in a single notice of termination when there are sufficient facts to support both actions. Appellant has not cited, and the Board is not independently aware of, any legislative history that indicates that the Legislature, when it enacted the civil service statutes, intended that these two actions would necessarily displace one another, precluding departments from initiating both a non-punitive termination and a dismissal at the same time.⁶

Third, there is nothing in the record to establish that appellant was substantially injured or prejudiced by the Department's having included both a non-punitive termination and a dismissal in the Notice. The Department clearly notified appellant of both actions in its Notice. Appellant had a full and fair opportunity to oppose both actions during the hearing before the ALJ. In order to prevail on both actions, the Department was required to meet the applicable burdens of proof. Since appellant was accorded all of his due process rights in this matter relating to both the non-punitive termination and the dismissal, he can not claim substantial injury or prejudice.

⁶ See Farmers Insurance Exchange v. Superior Court (1992) 2 Cal. 4th 377, 395; People v. Damon (1996) 51 Cal. App. 4th 958, 970-1.

Fourth, it is a much more efficient use of both the parties' and the Board's time and resources if the Department is permitted to consolidate in one case all of the grounds for dismissal or termination it may have against appellant arising out of the same basic facts, instead of being required to pursue them on a piecemeal basis in separate cases. If a state agency believes that it has sufficient grounds for, and wishes to pursue, both a non-punitive termination and a dismissal against an employee, it should not be forced to choose one of these options and, only when that initially chosen option is revoked or modified by the Board or a court, be permitted to pursue the other option. In addition, an employee should not be put at risk for multiple separate actions based on the same basic facts. Finally, the Board should not have to conduct multiple appeal hearings when all issues could be determined during a single hearing.

The Board, therefore, finds that the Department was not precluded from simultaneously dismissing and non-punitively terminating appellant.

The dismissal is modified to a six-month suspension and the non-punitive termination is sustained.

The Adverse Action

Appellant's conduct of slapping his daughter with such force as to break her nose and blacken her eyes constituted a violation of Government Code § 19572, subdivisions (m) discourteous treatment of the public or other employees; and (t) other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment. Appellant's conviction for misdemeanor battery under Penal Code § 242, however, did not constitute a misdemeanor involving moral turpitude under Government Code § 19572,

subdivision (k). (People v. Mansfield (1988) 200 Cal.App.3d 82, 88.) The cases cited by respondent are inapposite since they involved the willful and intentional infliction of injury on a child, an element not present in the offense of battery or under the facts of appellant's case.

As a Correctional Administrator and peace officer, appellant must be held to a high standard of behavior. His conduct of slapping his 16-year old stepdaughter with sufficient force to break her nose and blacken her eyes was inconsistent with his position as a prison administrator and amply warranted strong disciplinary action against him. However, the circumstances surrounding appellant's misconduct must be taken into account in assessing the appropriate penalty.

In this case, the action was a spontaneous one. It occurred on only one occasion. Appellant immediately expressed remorse for his misconduct and reported the incident to authorities. He had no past history of violence, and everyone who knew him found his conduct on this occasion to be out of character. The probation department, which prepared appellant's sentencing report, found a low likelihood of recurrence of the behavior. In light of appellant's 25-year history of exemplary service to the Department, the ultimate penalty of dismissal would not be justified for appellant's loss of control on one occasion. Under all the circumstances, a six-month suspension is a just and proper penalty for the proven misconduct.

The Non-punitive Termination

Government Code § 19585 (b) provides in relevant part:

An appointing power may terminate, demote, or transfer an employee who fails to meet the requirement for continuing employment that is prescribed by the Board on or after January 1, 1986, in the specification to which the employee is appointed.

In the instant case, the specification for the class of Correctional Administrator requires appellant to be able to use a firearm in an emergency situation. The specification further provides that disqualification from using or possessing a firearm under Federal or State law renders an incumbent ineligible to continue employment in the classification. Although appellant contends that the circumstances where a Correctional Administrator might be required to possess or use a firearm are highly remote, the requirement nonetheless appears in the class specification and renders appellant subject to nonpunitive termination under section 19585.

Appellant argues that even if the firearm disqualification requires appellant's removal from the Correctional Administrator position, the Board should modify the termination to a demotion or transfer to a non-peace officer classification, such as Correctional Business Manager, which would not require appellant to use or possess a firearm. Appellant argues that since section 19585 provides that a Department "may terminate, demote, or transfer" such an employee, the Board has the authority to modify the termination to a demotion or transfer.

A similar contention was made and rejected in the Board's precedential decision in George Lannes (1992) SPB Dec. No. 92-10. In that case, the Department of Transportation terminated a Structural Steel Painter under section 19585 after his driver's license was suspended for a year. The minimum qualifications for the position required possession of a valid California driver's license. The evidence established that the employee could have continued to work in the same position without causing any inconvenience to his supervisor or other employees until his license was restored, and that he was willing to work other jobs within the Department that did not require a valid

driver's license. The Board nonetheless held that the appointing authority was within its statutory rights in terminating the employee:

The Department has the choice to transfer or demote an employee rather than terminate him or her, but the Department has no statutory obligation to justify its decision to terminate an employee so long as the statutory prerequisites for a nonpunitive termination are satisfied.

In the instant case, since appellant's firearm disqualification satisfied the statutory prerequisites for a non-punitive termination, the Board will not disturb the Department's decision to non-punitively terminate him.

For the foregoing reasons, the Board sustains appellant's non-punitive termination and modifies his dismissal to a six-month suspension.

The non-punitive termination governs appellant's future employment rights under the circumstances of this case.

While the Department could initiate both an adverse action and a non-punitive termination against appellant in a single notice, the consequences of each of these actions for appellant's future employment are very different.⁷ The Board is, therefore, called upon to resolve the apparent conflict in appellant's future employment rights that arises from sustaining both the non-punitive termination and the suspension. In making this determination, the Board relies upon the principle set forth in Lannes: a department

⁷ An employee who is dismissed not only loses his or her job, his or her name is removed from all employment lists on which it may appear and he or she may not take any state civil service examination or be certified to any position in the state civil service without the consent of the Board's Executive Officer or the Board. (Government Code §§ 18935 and 19583.1; California Code of Regulations, Title 2, § 211.) Although an employee who is non-punitively terminated under Government Code § 19585 may lose his or her current job, he or she may still take civil service examinations and compete for other civil service jobs for which he or she is qualified and, if and when the needed employment requirement is attained, he or she may be permissively reinstated to his or her former position. An employee who is suspended retains his or her job.

has the right to non-punitively terminate an employee so long as the statutory prerequisites for a non-punitive termination set forth in Government Code § 19585 are met. The Board has sustained the non-punitive termination against appellant because it has found that appellant does not meet a requirement for continuing employment and is, therefore, no longer qualified to hold the position of Correctional Administrator. Thus, appellant's non-punitive termination must take precedence over his suspension.⁸ The financial consequences to appellant of the suspension will be absorbed in the non-punitive termination, but evidence of the adverse action will remain in appellant's official personnel file.

CONCLUSION

The Board sustains appellant's non-punitive termination and modifies his dismissal to a six-month suspension. Appellant's non-punitive termination shall take precedence over the suspension, evidence of which will remain in appellant's official personnel file even though appellant will not have to serve that suspension.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The non-punitive termination taken against Raymond M. Novencido from the position of Correctional Administrator at High Desert State Prison, Department of Corrections at Susanville is sustained;

⁸ Since the public has an interest in seeing that dismissed state employees are not retained in or returned to public office, if the Board had sustained both the non-punitive termination and the dismissal, the dismissal would have taken precedence over the non-punitive termination and appellant would have only those very limited civil service employment rights as are granted to dismissed employees under

2. The dismissal taken against Raymond M. Novencido from the position of Correctional Administrator at High Desert State Prison, Department of Corrections at Susanville is modified to a six-month suspension;
3. In determining Raymond M. Novencido's future civil service employment rights, the non-punitive termination shall take precedence over the suspension, and Raymond M. Novencido shall have only those civil service employment rights that are granted to non-punitively terminated employees under applicable law;
4. Raymond M. Novencido shall not be required to serve the six-month suspension, although evidence of it shall remain in his official personnel file; and
5. This decision is certified for publication as a Precedential Decision.
(Government Code § 19582.5).

STATE PERSONNEL BOARD

Florence Bos, President
Richard Carpenter, Vice President
Ron Alvarado, Member
James Strock, Member
Lorrie Ward, Member

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applicable statutes and regulations. In other words, a non-punitive termination takes precedence over an adverse action other than dismissal.

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on December 8 - 10, 1998.

Walter Vaughn
Executive Officer
State Personnel Board

[Novencido.dec]